2012 WL 1063539 (Mich.) (Appellate Brief)
Supreme Court of Michigan.

In re Estate of Arnold E. MORTIMORE, Deceased.
Helen M. FISER, Respondent-Appellant,
v.
Renee HANNEMAN and Dean Mortimore, Petitioners-Appellees.

No. 143307.
February 15, 2012.

Court of Appeals No. 297280
Shiawassee County Probate Court No. 09-034102-DA

Respondent-Appellant's Reply Brief

Douglas A. Mielock (P42924), Foster, Swift, Collins & Smith, P.C., 313 S. Washington Square, Lansing, Michigan 49833-2193, (517) 371-8100, Attorneys for Respondent-Appellant.

Douglas G. Chalgian (P54757), Chalgian & Trip Law Offices PLLC, 1019 Trowbridge Rd., East Lansing, Michigan 48823, (517) 332-3800, Attorneys for Petitioners-Appellees.

***ii** TABLE OF CONTENTS

***iii** INDEX OF AUTHORITIES

*1 INTRODUCTION

Both Respondent-Appellant Fiser ("Appellant") and Petitioner-Appellees ("Appellees") agree that the purpose of the doctrine of undue influence is to effectuate the intent of the donor. Setting aside the parties' divergent interpretations of Michigan Rule of Evidence 301 and the effect of *Widmayer v Leonard,* 422 Mich 280 (1985) on the law of evidentiary presumptions, the fundamental conflict between the positions advocated by the parties is how the presumption of undue influence can best be employed to achieve this purpose. Appellant argues that the donor's intent will best be effectuated if the quantum of evidence necessary to rebut a presumption of undue influence is "substantial evidence" (more than scintilla but less than a preponderance of the evidence); Appellees argue that a preponderance of the evidence should be required to rebut a presumption of undue influence.

Applying the "substantial evidence" standard is more likely to give effect to the donor's intent because it does not confer unwarranted weight to the presumption of undue influence. The presumption of undue influence is an *imperfect* predictor of undue influence. Conferring unwarranted weight to the imperfect presumption of undue influence will increase the number of circumstances in which the proponent will not be able to rebut the presumption of undue influence when the gift was not the actually the product of undue influence. Given the relative ease with which the presumption of undue influence arises under Michigan law, and the difficulty inherent in proving a negative (the absence of undue influence), in some circumstances the presumption of undue influence may be used to subvert the donor's intent. This reply proceeds by first illustrating how the presumption of undue influence may be used to impair a donor's freedom to make gifts of property, followed by a rebuttal of Appellees' argument that the quantum of evidence to rebut a presumption under Michigan law should be a preponderance of the evidence.

*2 ARGUMENT

I. REQUIRING A PREPONDERANCE OF THE EVIDENCE TO REBUT A PRESUMPTION OF UNDUE INFLUENCE WOULD TOO OFTEN RESULT IN FRUSTRATING THE DONOR'S INTENT.

a. Less than a preponderance of the evidence should be required to rebut the presumption of undue influence because the presumption is an imperfect predictor of undue influence.

The most appropriate framework for determining the quantum of evidence necessary to rebut a presumption is to begin by assessing the probability that the presumed fact (undue influence) follows from the facts that create the presumption. "[M]ost presumptions have come into existence primarily because judges have believed that proof of fact B renders the inferences of the existence of fact A so probable that it is sensible and timesaving to assume the truth of fact A until the adversary disproves it." [1] To rebut a presumed fact, a proponent should not be required to prove that the presumed fact is more likely than not false. Instead, the proponent should only be required to introduce evidence that causes the presumed fact to be so less probable that it is no longer appropriate for the presumption to apply.

With regard to the presumption of undue influence, the risk of erroneous judicial determinations is greatest where there is a low probability that the presumed fact is true and a greater quantum of evidence is required to rebut the presumption. As highlighted by this Court's decision in *In re Estate of Karmey,* 468 Mich 68 (2003), there is no longer a strong practical likelihood that a transaction was the result of undue influence simply because the presumption of undue influence arose. Accordingly, a lesser quantum of evidence should be required to rebut the presumption of undue influence.

***3** In *Karmey*, "the children of the decedent claimed that the beneficiary of the will, decedent's second wife, had exercised undue influence over the decedent when he made her the sole beneficiary of his estate." *Id.* at 69. Even though decedent's wife

admitted to having a confidential relationship with the decedent, the trial judge held that neither a fiduciary nor a confidential relationship existed between the decedent and his wife. *Id.* at 71. Accordingly, no presumption of undue influence arose. *Id.* However, the Court of Appeals reversed and held "that the proofs of a trusting marital relationship between [the decedent] and [his wife] established a mandatory presumption of undue influence." *Id.* This Court reversed the Court of Appeals and held that marriage is not *ipso facto* a "confidential relationship" because it "is a unique relationship, treated in law differently from other relationships, for a host of obvious reasons." *Id.* at 75.

The presumption of undue influence depends almost entirely on the existence of a confidential relationship.[2] **The basic problem, as illustrated by *Karmey,* is that the existence of a "confidential relationship" is not sufficiently predicative of undue influence.** Michigan courts have repeatedly defined the term "confidential relationship" broadly.[3] In accord with this broad definition, a donee will frequently have occupied a "confidential relationship" with the donor, but in most cases, the donor's gift is made because of the affection resulting from the strong relationship between the donor and donee. As a result, the presumption of undue influence yields many "false positives," or situations where undue influence is *presumed*, but the gift was not actually the product ***4** of undue influence. In these situations the intended donee will be burdened with proving a negative (the absence of undue influence).

Karmey remedied this harsh result for married couples by excluding marriage from the definition of "confidential relationship." However, the larger problem remains unaddressed Given the current definition of "confidential or fiduciary relationship," a presumption of undue influence may frequently arise and frustrate the donor's intent. Contrary to the emotional argument advanced by Appellees, allegations of undue influence do not arise only where a "**vulnerable** adult" has been a victim of financial exploitation. The presumption of undue influence affects both "**vulnerable** adults" and "non-**vulnerable** adults" alike; lack of capacity is not an element of the presumption of undue influence. The following case and examples illustrate two situations where a presumption of undue influence could arise to frustrate the donor's intent.

b. Examples of where the Michigan presumption of undue influence may frustrate the donor's intent.

i. Example 1 - Unequal Distributions Between Children

Parent is an 80-year old widow with four children, three of whom live out-of-state. Child 1 lives in Michigan, and has assisted Parent with the activities of daily living for the past ten years. Child 1 assists Parent with the maintenance of Parent's property (i.e., mowing the lawn and maintaining Parent's vehicle), Parent's financial affairs (preparing and filing tax returns, paying bills, managing investments, and purchasing groceries), and medical care (filling prescriptions, scheduling appointments, and driving Parent to medical providers). No guardian or conservator is ever appointed for Parent. Child 1 never asks for nor receives any compensation for his service to Parent. Parent's will initially provided that her estate was to be shared equally among her four children. However, without involving an attorney, Parent amends her will to leave one-half of her estate to ***5** Child 1 in recognition of Child 1's devotion to Parent and personal sacrifice, and the other one-half to her other three children. Upon Parent's subsequent death, Parent's other children, disappointed with their smaller shares of the estate, allege that Parent's will is a product of undue influence by Child 1 and object to the probate of the will.

ii. Example 2 - Devise to Unrelated Person

Testator dies without children and leaves an estate worth $1 million. Testator had a well-recognized pleasant and agreeable demeanor. For most of his life, Testator was close friends with Nick. Joe, Nick's son, grew up accompanying Nick and Testator on their fishing, hunting trips, and other annual excursions. Nick died a number of years ago, but Joe has continued to accompany Testator on numerous vacations each year and visits regularly. Without telling Joe, Testator names Joe as his agent under a durable power of attorney.[4] Without involving an attorney, Testator executes a will leaving one-half of his estate to Joe, with the remaining one-half to be divided equally between Testator's two surviving sisters. Unhappy with their share, Testator's sisters alleged undue influence by Joe and object to the probate of Testator's will.

c. There are limited types of evidence available to rebut the presumption of undue influence.

A proponent is likely to draw from one or more of the following categories of evidence in attempting to rebut a presumption of undue influence: (i) the donor consulted with, and was advised by, an independent attorney prior to making the gift (and the independent attorney prepared any instrument effectuating the gift); (ii) the donor affirmed his intent to make the gift in ***6** communications with one or more third parties before or after the gift was made; (iii) the donor was not easily pursuaded or convinced by others; (iv) despite the existence of a confidential or fiduciary relationship, the nature of the dono's relationship with the donee was one such that the gift was natural or expected; or (v) the proponent had no involvement in the preparation of the gift instrument. Appellant argues that evidence of any one of the following factors *standing alone* should be sufficient to rebut the presumption of undue influence. Such evidence would meet the "substantial evidence" standard advocated by Appellant, but such evidence would unlikely meet the "preponderance of evidence" standard advocated by Appellees.

In Example 1, above, due to Parent's dependence on the assistance provided by Child 1, the presumption of undue influence would most probably arise because there was "confidence reposed on one side, and... resulting superiority and influence on the other." *In re Wood's Estate*, 374 Mich 278, 283 (1965). Child 1 would have difficulty in attempting to rebut the presumption of undue influence because limited evidence would be available to show the absence of undue influence. The only evidence available to Child 1 to rebut the presumption of undue influence is that Child 1's relationship with Parent was one where the gift was natural or expected, and that Child 1 had no involvment in the preparation of the gift instrument. If Child 1 could not rebut the presumption, Parent's intent would be fustrated. The same is true in Example 2.

A presumption of undue influence would arise in Example 2 because Joe had a fiduciary relationship with Testator. Joe only has the same two categories of evidence available to rebut the presumption of undue influence that were available to Child 1. Testator's intent will be fustrated if this evidence is not sufficent to rebut the presumption of undue influence.

***7 II. UNDER MICHIGAN RULE OF EVIDENCE 301 AND WIDMAYER VLEONARD, 422 MICH 280 (1985), THE QUANTUM OF EVIDENCE NECESSARY TO REBUT A PRESUMPTION IS LESS THAN A PREPONDERANCE OF THE EVIDENCE.**

This Court's opinion in *Widmayer v Leonard*, 422 Mich 280 (1985), and the plain language of Michigan Rule of Evidence 301 ("MRE 301"), both indicate that following the enactment of MRE 301, the quantum of evidence necessary to rebut a presumption of undue influence was returned to some amount less than a preponderance of the evidence. This conclusion is buttressed by a number of scholarly articles on evidentiary presumptions, discussed infra. Nevertheless, Appellees have argued that neither Widmayer nor the enactment of MRE 301, had any effect on the quantum of evidence necessary to rebut a presumption of undue influence. Regarding Widmayer, Appellees have argued that:

> Appellant bases its whole argument on the assumption that Widmayer changes everything. This is an incorrect assumption which is supported by a quote, taken out of context, and a misunderstanding of the Thayer theory of presumptions... The quote cited by Appellant from Widmayer is only a historical reference and not a proclamation of a new standard.

(Appellant's Brief at 7-8) (emphasis added). However, Appellant's argument that the "substantial evidence" standard is the correct quantum of evidence necessary to rebut a presumption of undue influence is not based on an incorrect assumption, but rather a logical syllogism, drawn from this Court's opinion in *Widmayer*, *which has been adopted by at least two panels of the Court of Appeals.* [5]

Citing to In re Teller's Estate, 288 Mich 193 (1939), [6] this Court stated in *Widmayer* that:

Prior to *Wood*, Michigan had adhered to the "Thayer" bursting bubble theory of presumptions. This theory held, in substance, that a presumption was a procedural ***8** device which regulates the burden of going forward with the evidence and is dissipated when **substantial evidence** is submitted by the opponents to the presumption.

422 Mich at 286 (emphasis added). Widmayer goes on to say that "[i] 1978, Michigan adopted MRE 301, the language of which parallels FRE 301, which was, in essence, an adoption of the Thayer theory regarding the use of civil presumptions." Id. at 288 (emphasis added). Since MRE 301 essentially adopted the Thayer theory of civil presumptions, and because a civil presumption under the Thayer theory is dissipated when "substantial evidence" is submitted by the opponents to the presumption, then only "substantial evidence" is necessary to rebut a presumption of undue influence. Although the amount of evidence necessary to rebut a presumption could theoretically be "beyond a reasonable doubt" under some variation of the Thayer theory, [7] such a standard is not consistent with Michigan jurisprudence. Moreover, any rebuttal standard amounting to a preponderance of the evidence or more would be inconsistent with MRE 301.

Michigan Rule of Evidence 301 provides:

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

MRE 301. In a case involving a claim of undue influence, the contestant bears the burden of persuasion (the risk of nonpersuasion). *Kar v Hogan*, 399 Mich 529, 539, (1976). To meet this burden, the contestant must prove by a preponderance of the evidence that the gift was the product of undue influence. *Olson v Rasmussen*, 304 Mich 639, 652 (1943). Under MRE 301, once a presumption of undue influence arises, only the burden of production is shifted to the opponent of ***9** the presumption. The burden of persuasion does not shift. [8] The presumption disappears once the proponent meets his or her burden of production.

Under the view advocated by Appellees, the proponent must rebut the presumption of undue influence with a preponderance of the evidence showing the absence of undue influence. This rule would render the distinction between the burden of persuasion and the burden of production meaningless. In effect, the burden of persuasion would shift. This has led leading scholars to conclude that the **"the evidence necessary to rebut [a civil presumption] will be less than the burden of persuasion in the case."** 1 Weinstein and Berger, Weinstein on Evidence, § 301.02 [3][C] (Matthew Bender 1992); see also 1 Graham,Handbook of Federal Evidence, § 301.4 at 140. Weinstein further elaborates on the amount of evidence necessary to rebut a presumption: The opponent of the presumed fact, in order to rebut, generally has the burden of presenting enough evidence so that a reasonable jury could be convinced of the non-existence of the presumed fact. This evidentiary requirement has been variously described as the need to come forward with "only some evidence" or the amount of evidence "that would be sufficient to overcome a directed verdict."

Id. Weinstein also recognized that courts may occasionally "ignore" rules of evidence when applying a "well established" common law presumption and shift the burden persuasion to the proponent. *Id.* at §301.06[1]. However, it is unclear how this Court could endorse such a practice when it would be contrary to the plain language of Michigan Rule of Evidence 301.

III. CONCLUSION.

In the proceedings before the trial court, Appellant produced the type of evidence that would ordinarily be available to a proponent to rebut the presumption of undue influence. Appellant ***10** offered evidence that, despite the existence of a confidential or fiduciary relationship with her husband, Arnold E. Mortimore, the nature of her relationship with Arnold E.

Mortimore was one such that the gift Appellant received was natural or expected. Second, there was no evidence that Appellant was involved in the preparation of the gift instrument. Third, the trial court judge heard extensive evidence showing that Arnold E, Mortimore was not easily persuaded or convinced by others. In determining that the will of Arnold E. Mortimore was not the product of undue influence, the trial court judge relied on the fact that Arnold E. Mortimore's "doctor of 25 years felt that [Arnold E. Mortimore] was able to make a decision of his own free will." (Appendix at 1 la). The evidence produced by Appellant at trial was sufficient to cause the presumed fact of undue influence to become so less probable that it was no longer appropriate for the presumption to apply.

The trial court found "[t]hat there is not sufficient grounds to find undue influence under any of the conditions and standards of the case law." (Appendix at 11 a-12a). This necessarily means that, even under a preponderance of the evidence standard, the trial court determined that Appellant rebutted the presumption of undue influence. It was inappropriate for the Court of Appeals, under a clearly erroneous standard of review, to recharacterize the trial court's determination to achieve a different result. Accordingly, Appellant asks this Court to reverse the decision of the Court of Appeals and reinstate the decision of the trial court in this matter.

Appendix not available.

Footnotes

1 1 Weinstein and Berger, *Weinstein on Evidence*, § 301.02[3][C]. *See also In re Wood's Estate*, 374 Mich 276, 288-89; 32 NW2d 35 (1965) (stating that presumptions are "crystallized inferences of fact. Experience has taught that if certain evidentiary facts be established, there is such a strong practical likelihood that stated fact will be true that the fact may be presumed").

2 As stated in Appellant's Brief on Appeal, which was not refuted by Appellees, "[e]stablishing the presumption of undue influence Michigan law almost always depends entirely on the introduction of evidence of a confidential or fiduciary relationship between the donor and the alleged wrongdoer. The issue of undue influence simply would not come up unless the alleged wrongdoer (or someone affiliated with the alleged wrongdoer) benefited from the transaction. The alleged wrongdoer almost always had some interaction with the donor, and therefore had some 'opportunity' to influence the donor, (Appellant's Brief on Appeal at 18)

3 *In re Estate of Karmey*, 468 Mich 68, fn 2 (2003); *Taylor v Klahm*, 40 Mich App 255, 264-65, 198 NW2d 715 (1972); *In re Wood's Estate*, 374 Mich 278, 282 (1965).

4 Under Michigan law, an agent under a durable power of attorney is a fiduciary as a matter of law. *In re Susser Estate*, 254 Mich App 232, 236; 657 NW3d 147 (2002). Further, at least one panel of the Michigan Court of Appeals has held that "the mere enactment of the power of attorney created a fiduciary relationship between [proponent] and the decedent" - even if the proponent was not aware the power was granted. *In re Estate of Mayes*, unpublished opinion per curiam of the Court of Appeals, issued Dec 20, 2002 (Docket No. 231605); 2002 WL 31956968 (citing *Susser*, 254 Mich App at 236.).

5 *See State Farm Mut Auto Ins Co v Allen*, 191Mich App 18, 22; 191 Mich App 18, 477 NW2d 445 (1991); *Jozwiak v N Michigan Hospitals*, 231 Mich App 230, 238; 586 NW2d 90 (1998)

6 In *In re Teller's Estate*, a presumption of undue was rebutted by merely the testimony from the attorney who drafted the will. *In re Teller's Estate*, 288 Mich 193, 199 (1939).

7 *See* Neil S. Hecht and William M. Pinzler, *Rebutting Presumptions: Order Out of Chaos*, 58 B.U.L. Rev 527, 534 (1978); (Appendix to Appellant's Brief on Appeal at 75a).

8 Michigan Rule of Evidence 301; See also In re Estate of Richardson, unpublished opinion per curiam of the Court of Appeals, issued Dec 20, 2002 (Docket No. 231605); 2002 WL 31956968 (stating that "the presumption merely placed the burden of producing evidence on the petitioner; it does not shift the burden of proving the lack of undue influence to the petitioner.").

End of Document